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IN THE

Supreme Court of the United States

October Term, 1963

No. 313

MARION A. STOVER and WEBSTER STOVER,
Appellants,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Appellee.

On Appeal from the Court of Appeals of the State of New York

MOTION TO DISMISS

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MOTION TO DISMISS

Appellee, The People of the State of New York, pursuant to Rule 16 of the Revised Rules of this Court, moves to dismiss the appeal herein on the ground that the appeal does not present a substantial federal question.

Statement of the Case

This is an appeal from an order of the Court of Appeals of the State of New York, entered on May 9, 1963, affirming the judgments of conviction of the County Court of Westchester County of the State of New York which had affirmed the judgments of conviction of the City Court of the City of Rye for violations of an ordinance prohibiting the erection and maintenance of clothes lines in a front yard or side yard abutting a street without a permit.

The appellants reside in a one-family dwelling, located at the corner of an intersection, in a residential district of the City of Rye. At the time of the violations, the appellants had erected and were maintaining six separate clothes lines across their front yard and side yard abutting a street, filled with tattered clothes, rags, old uniforms, underwear, scarecrows, etc. (Record on Appeal, pp. 36-37, People's Exhs. 1 and 2).

In 1961 the City of Rye adopted an ordinance prohibiting clothes lines in a front yard or a side yard abutting a street without a permit. The appellant, Marion A. Stover, applied for a permit to maintain the clothes lines in the front yard, but her application was denied because she had sufficient property available elsewhere for hanging clothes (People's Exh. 3). She did not appeal to the Board of Appeals which was permissible under the ordinance, and the appellants refused to remove their clothes lines from the front or side yards which were in violation of the ordinance (Record on Appeal, pp. 48, 49).

Upon the complaint of the Building Inspector, on two separate occasions, the appellants were found guilty of violating the ordinance. The violation of the ordinance constitutes an offense and not a misdemeanor. In both instances, Marion A. Stover received a suspended sentence, but Mr. Stover was fined $25 on the first conviction which he paid, and on the second conviction, he was sentenced to a fine of $100 or 30 days in jail (Record on Appeal, pp. 23, 57).

Upon appeal to the County Court of Westchester County, both judgments of conviction were affirmed (see court's opinion, Record on Appeal, pp. 58-70). Mr. Stover refused to pay the fine and was confined to the County Penitentiary. After 11 days of confinement, the appellants were granted leave to appeal to the Court of Appeals and a stay of the enforcement of the judgment. The Court of Appeals affirmed the judgments of conviction and rendered an opinion sustaining the validity of the ordinance (Appendix A).

The appellants had contended that they had erected and maintained the clothes lines as a protest of their assessments and taxes. Although they filed a protest on Grievance Day, they have never commenced a certiorari proceeding to review their assessments.

ARGUMENT

The federal questions presented are not substantial.

The questions presented by the appellants, based upon an alleged violation of the First and Fourteenth Amendments of the Constitution of the United States, are as follows:

1. Whether the application of an ordinance regulating aesthetics so as the prohibit peaceful, political protest is invalid as a restraint on freedom of speech and press.

2. Whether non-violent speech can be prohibited because it works an injury to property.

3. Whether the ordinance is invalid on its face because its alleged sole purpose and effect is to prohibit peaceful, political protest.

1. The ordinance as applied is valid and there is no real abridgement of freedom of speech and press.

a. The police power "embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety". *Bacon* v. *Walker*, 204 U. S. 311, 317; *C. B. & Q. Railway Co.* v. *Drainage Commissioners*, 200 U. S. 561, 592; *Opinion of the Justices to the Senate*, 333 Mass. 773, 128 N. E. 2d 557, 561. It "extends beyond health, morals and safety, and comprehends the duty, within constitutional limitations, to protect the well being and tranquillity of a community".

Kovacs v. *Cooper*, 336 U. S. 77, 83. "The concept of the public welfare is broad and inclusive. * * * The values it represents are spiritual as well as physical, aesthetic as well as monetary". *Berman* v. *Parker*, 348 U. S. 26, 33. The state legislatures are entitled to their own standard of the public welfare. *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U. S. 421, 423.

Aesthetic considerations are taken into account in regulating activities which may be carried on in various zones, in establishing setback lines, in requiring side and rear yard areas of specified sizes, in establishing minimum lot areas, in regulating look-alike homes, in imposing various requirements on subdivisions, in granting or refusing variances and special permits of various kinds, and in connection with many other matters. Rodda, The Accomplishment of Aesthetic Purposes under the Police Power, 27 So. Calif. L. Rev. 149, 155.

The exercise of the police power is entitled to the presumption of validity. *Bibb* v. *Navaja Freight Lines, Inc.*, 359 U. S. 520, 529; *Williamson* v. *Lee Optical Co.*, 348 U. S. 483; *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U. S. 421; *Lincoln Union* v. *Northwestern Co.*, 335 U. S. 525. The Court of Appeals of the State of New York has sustained the constitutionality of the ordinance herein and its decision is entitled to the greatest respect and, in a case of this kind, it should not be interfered with unless it is clearly unreasonable, arbitrary and plainly wrong. *Gorieb* v. *Fox*, 274 U. S. 603, 609; *Cusack Co.* v. *City of Chicago*, 242 U. S. 526, 529. It can not be said that the ordinance has no rational basis to its objectives.

The court's function in reviewing an ordinance of a municipality is a narrow one. It does not decide whether the policy of the City is wise or whether it is based on assumptions that are scientifically substantiated. It can only inquire whether the City's action so subverts the fundamental liberties implicit in the Due Process Clause that it can not be sustained as a rational exercise of power. *Roth* v. *United States*, 354 U. S. 476, 501; *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583, 594.

b. It is well established that aesthetic considerations may be given due weight in connection with other factors which support the exercise of the police power, 11 Am. Jur., Constitutional Law, Sec. 280, p. 1040; 62 C. J. S., Municipal Corporations, Sec. 226(6), p. 438; *Burlington* v. *Dunn*, 318 Mass. 216, 61 N. E. 2d 243, 246; *Criterion Service, Inc.* v. *City of East Cleveland* (Ohio App.), 83 N. E. 2d 300 (not officially reported).

Courts have sometimes upheld ordinances on seemingly insubstantial grounds or discovered rather implausible physical interferences as reasons for regulations which are clearly predicated on aesthetic considerations. *Lionshead Lake, Inc.* v. *Wayne Township*, 10 N. J. 165, 89 A. 2d 693, appeal dismissed 344 U. S. 919; *Murphy, Inc.* v. *Westport*, 131 Conn. 292, 297, 300, 40 A. 2d 177; *Farley* v. *Graney* (W. Va.), 119 S. E. 2d 833, 844 (not officially reported); Rodda, The Accomplishment of Aesthetic Purposes under the Police Power, 27 So. Calif. L. Rev. 149, 155.

Recent developments in the law indicate a definite trend in support of the position that aesthetic considerations alone may justify the exercise of the police power, 11 Am.

Jur., Constitutional Law, Sec. 280, pp. 1139-1140; *City of Sarasota* v. *Sunrad, Inc.* (Fla.), 114 So. 2d 377 (not officially reported); *City of Miami Beach* v. *Ocean & Inland Co.*, 147 Fla. 480, 3 So. 2d 364; *General Outdoor Advertising Co.* v. *Indianapolis*, 202 Ind. 85, 172 N. E. 309, 312; *Ware* v. *Wichita*, 113 Kan. 153, 157, 214 P. 99; *State ex rel. Civello* v. *City of New Orleans*, 154 La. 271, 97 So. 440; *City of New Orleans* v. *Levy*, 223 La. 14, 64 So. 2d 798; *Cochran* v. *Preston*, 108 Md. 220, 70 A. 13; *Opinion of the Justices to the Senate*, 333 Mass. 773, 128 N. E. 2d 557, 561; *State ex rel. Twin City B. & I. Co.* v. *Houghton*, 144 Minn. 1, 14, 174 N. W. 885, 176 N. W. 159; *Commonwealth* v. *Trimmer* (Pa.), 53 Dauph. Co. Rep. 91; *Thompson* v. *Carrollton* (Tex. Civ. App.), 211 S. W. 2d 970 (not officially reported); *State ex rel. Carter* v. *Harper*, 182 Wis. 148, 158-159, 196 N. W. 451; *State ex rel. Saveland Park Holding Corp.* v. *Wieland*, 269 Wis. 262, 69 N. W. 2d 217, cert. denied 350 U. S. 841; *Farley* v. *Graney* (W. Va.), 119 S. E. 2d 833, 843-844 (not officially reported); McQuillin, Mun. Corp., Vol. 8 (3rd ed.), Sec. 25.31, p. 67; Rathkoph, The Law of Zoning and Planning, Vol. 1, pp. 11-13 to 11-31.

Ugly sights and discordant surroundings may be just as distressing to the average person's sensibilities as nauseous smells, *State ex rel. Carter* v. *Harper*, 182 Wis. 148, 159, 196 N. W. 451. A city is entitled to preserve and enhance the beauty, attractiveness and charm of its residential areas and maintain the quietude and rural character of the community. As this Court has said in *Berman* v. *Parker*, 348 U. S. 26, 33, "It is within the power of the legislature to determine that the community should be

beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."

Appellants do not contest the right of the City to regulate for aesthetic reasons, but urge that the City's interest in aesthetics does not constitute the type of paramount interest required to justify a restraint of freedom of speech (Br., pp. 11-12). This Court should not be concerned with a frivolous claim of interference with speech or press.

c. The maintenance in the front yard of a residence of a half dozen clothes lines, filled at all times with tattered clothes, rags, underwear, etc., is not a form of speech within the scope of the First Amendment. It is not a medium of communication involving the transmission of messages or the discussion of public issues. Even if it is assumed to be such a form of speech, as it was assumed by the Court of Appeals (Appendix A, p. 8a), there is no real abridgement of freedom of speech. It is a frivolous claim to say that the appellants' bizarre form of "protest" is a medium of communication that should be protected against the greater interests of the community. Preservation of property values is a great deal more than just a "slender ground" as urged by the appellants. Zoning is principally predicated on the preservation and enhancement of property values.

The cases in this Court have recognized that freedom of speech is not an absolute, unlimited right, but on occasion must be subordinated to other values and considerations, *Konigsberg* v. *State Bar of California*, 366 U. S. 36, 49-50; *Dennis* v. *United States*, 341 U. S. 494, 503; *Chap-*

linsky v. *New Hampshire*, 315 U. S. 568, 571; *Stromberg* v. *California*, 283 U. S. 359, 368; *Gitlow* v. *New York*, 268 U. S. 652, 666. It does not give immunity to speak on any subject at any time. *Roth* v. *United States*, 354 U. S. 476, 483; *Poulos* v. *New Hampshire*, 345 U. S. 395, 405; *Dennis* v. *United States*, 341 U. S. 494, 534; *American Communications Ass'n* v. *Douds*, 339 U. S. 382, 394. "The preferred position of freedom of speech in a society that cherishes liberty for all does not require legislators to be insensible to claims by citizens to comfort and convenience. To enforce freedom of speech in disregard of the rights of others would be harsh and arbitrary in itself". *Kovacs* v. *Cooper*, 336 U. S. 77, 88. The exercise of free speech is subject to certain reasonable restrictions.

The appellants' use of their property as a platform for the projection of speech necessarily involves the utilization of the streets for the transmission of their message to pedestrians, motorists and neighbors. In *Kovacs* v. *Cooper*, 336 U. S. 77, an ordinance prohibiting the use on public streets of sound trucks that emit loud and raucous noises was held not to infringe on the right of free speech. Although loud and raucous noises are not emitting from appellants' property, equally offensive utterances or messages therefrom are disturbing and distracting to the well being and tranquillity of the community.

The fallacy of the appellants' argument is aptly noted as shown by the following language of the concurring opinion of Justice Frankfurter in *Kovacs* v. *Cooper*, 336 U. S. 77, 96:

> "Some of the arguments made in this case strikingly illustrate how easy it is to fall into the ways of mechanical jurisprudence through the use of oversimplified formulas. It is argued that the Constitution protects freedom of speech: freedom of speech means the right to communicate, whatever the physical means for so doing; sound trucks are one form of communication; *ergo* that form is entitled to the same protection as any other means of communication, whether by tongue or pen. Such sterile argumentation treats society as though it consisted of bloodless categories."

This Court has consistently recognized that "certain forms of speech in certain contexts, have been considered outside the scope of constitutional protection" and that certain "general regulatory statutes, not intended to control the content of speech, but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First and Fourteenth Amendments forbade the legislators to pass". *Konigsberg* v. *State Bar of California*, 366 U. S. 36, 50-51.

The ordinance herein rests upon the police power of the City to promote the general welfare for the tranquillity and convenience of the community, the preservation of the beauty and orderliness of its residence character, unmarred by unsightly and offensive scenes, and the enhancement of its realty values. It is not aimed at speech or the content of speech. Any effect its action may have upon speech is purely incidental. There is no unreasonable burden or restriction in the use of appellants' property to compel them to use the rear yard or the other side yard. There is no rational basis why appellants' grotesque man-

ner of protesting their assessment should be given a preferred position as against the protection of the inhabitants from a form of speech which is offensive to their sensibilities and harmful to property values. The procedures for review of assessment of real property are well established, but appellants refuse to avail themselves of such procedures. The method used is legally ineffectual, and as the Court of Appeals stated "the value of their 'protest' lay not in their message but in its offensiveness" (Appendix A, p. 9a).

d. The Court of Appeals did not reject a traffic or health justification for the ordinance. It only said that although there may be considerable doubt whether there is a sufficiently reasonable relationship between clothes lines and traffic or fire safety to support the exercise of the police power, the ordinance may be sustained as an attempt to preserve the residential appearance of the City and its property values (Appendix A, p. 4a). Clothes racks in the front lawn, "permanently" filled with rags, can interfere with traffic visibility at corners or in driving out of driveways just as much as high hedges or billboards.

e. It is urged that the ordinance did not have to be enforced so as to apply to the appellants' "speaking lines". But the evil to be remedied and the objectives to be attained are the same whether the lines are ordinary clothes lines or "speaking lines". Moreover, the matter of enforcement would be extremely difficult as it would not be known which were "speaking lines" until a summons were issued and such a claim asserted, a claim which was asserted first on the appeal herein.

f. Appellants' suggested basis of distinction of *Berman* v. *Parker* (Br., p. 12) is erroneous. Though a violation of the Fifth Amendment was urged in that case, the test is the same whether a violation of the First or Fifth Amendment is claimed. It is still a question of balancing the interests of the public and the individual. Here, the ordinance bears no necessary relationship to speech and its effect thereon is incidental. It was not politically motivated as suggested by the dissenting opinion of the Court of Appeals (Appendix A, p. 11a).

The ordinance does not diminish the effective exercise of the right of free speech. There is no real abridgement of freedom of speech or press. The prohibition of the clothes lines in the front yard bears no necessary relationship to the freedom to speak, write, print or distribute information, or to its other reasonable dissemination.

2. Non-violent speech can under certain circumstances be prohibited because it works an injury to property.

Certain forms of speech causing injury to person and property are not protected under the constitutional amendments. *Konigsberg* v. *State Bar of California*, 366 U. S. 36, 50-51.

The exercise of the police power based on aesthetics is within the general welfare power of a city to protect the residential character of the community and the enhancement of property values. The regulation of billboards is based on the preservation of property values. The courts go to fantastic lengths to say that billboards directly injure morals while "the real reason for curbing

them is to preserve the general attractiveness of the city and especially to protect property values", Sayre, Aesthetics and Property Values, 35 A. B. A. J. 471, 472.

The police power may be utilized to foster the aesthetic side of municipal development to prevent things that offend the sense of sight in the same manner as things that offend hearing or smell. *General Outdoor Advertising Co.* v. *Indianapolis*, 202 Ind. 85, 172 N. E. 309. An eyesore in a residential area might be as much a public nuisance and as ruinous to property values in the neighborhood generally as a disagreeable noise, odor, or a menace to safety or health, *State ex rel. Civello* v. *City of New Orleans*, 154 La. 271, 97 So. 440, 444. The preservation of property values is a legitimate consideration since anything that tends to destroy property values necessarily adversely affects the prosperity and therefore the general welfare of the community, *State ex rel. Saveland Park Holding Corp.* v. *Wieland*, 269 Wis. 262, 69 N. W. 2d 217, 222, cert. denied 350 U. S. 841; *Best* v. *Zoning Board of Adjustment*, 393 Pa. 106, 141 A. 2d 606, 612. The prohibition of clothes lines in the front yard, filled with tattered clothes, rags, underwear, etc., does not present any imposing threat to the right of free speech. The unrestricted right "permanently" to maintain a half dozen clothes lines in the front yard filled with rags is very likely to cause serious injury to property values in the neighborhood in addition to offending the sensibilities of most inhabitants. Such a device is just as harmful as billboards and other signs in residential districts.

If harm develops from non-violent speech, there is no justification why it should not be regulated. The mainte-

nance of a half dozen clothes lines, filled at all times with tattered clothes, rags, old dresses, underwear, scarecrows, and other odd assortments of fabrics is not a "minor nuisance". Such uncontrolled use of the front yards would destroy the benefits of required setbacks and open spaces and, in a short time, create a slum appearance in a pleasant residential area limited to one family dwellings. The ordinance, though based on aesthetic considerations, proscribes conduct which offends the sensibilities of most inhabitants and tends to debase the community and reduce property values.

3. *The ordinance herein does not in its purpose or effect prohibit free speech in violation of the First Amendment.*

a. It is true that the evil that the ordinance was designed to remedy does not appear from its express words and there is no preamble, but it is not necessary to expressly describe the evil sought to be prohibited or regulated nor is a preamble necessary for the validity of an ordinance. A determination of the local legislative body involving the exercise of the police power must be given great weight and its determination is presumed to be constitutionally valid and supported by facts known to it or which could be reasonably assumed affords support for it, *Goldblatt* v. *Town of Hempstead*, 369 U. S. 590, 596; *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583, 594; *Gitlow* v. *New York*, 268 U. S. 652, 668; *Lincoln Building Associates* v. *Barr*, 1 N. Y. 2d 413, 415.

b. The Court of Appeals did not pass on the question whether there was sufficient traffic or fire hazard to sus-

tain the ordinance, but sustained it solely upon aesthetic considerations. Although that court indicated some doubt as to the sufficiency of the other factors underlying the adoption of the ordinance, appellee respectfully submits that these other factors, while not necessary for the validity of the ordinance, are entitled to some weight. This ordinance seeks to provide clear visibility at street corners and in driving out of driveways and thus avoid or reduce accidents, to reduce distractions to motorists and pedestrians, and to provide greater opportunity for access in the event of fires as well as to enhance the value of properties. Certainly, the "permanent" maintenance of a half dozen clothes lines filled with tattered clothes, rags, uniforms, underwear, scarecrows, etc., in front yards of residential areas, are just as harmful as billboards at intersections, signs in residential districts, or obstructions or structures in the front yards.

There is no support in the record for the comment of the minority opinion in the Court of Appeals that the origin of the ordinance was political in nature (Appendix A, p. 11a). The appellants were the only persons who have continuously maintained the clothes lines in violation of the ordinance and have refused to comply at all times.

c. The fact that the ordinance herein was adopted as part of the General Ordinances of the City of Rye and added to a section of Article 3, entitled "Miscellaneous" of Chapter 4 thereof, entitled "Public Morals and Conduct" is wholly immaterial and of no significance as it was placed there as a matter of convenience. The ordinance regulates a certain land use—it prohibits the maintenance

of clothes lines in the front yard without a permit. It is clear and unambiguous. If there were any ambiguity, then its heading or context to other provisions might be relevant on a question of construction.

The City's architectural controls are contained in a separate local law and are not part of the Building Zone Ordinance. The nuisance provisions in the Sanitary Code are adopted as a "Miscellaneous" regulation of the Sanitary Code. Also, provisions as to public sewers are contained in the General Ordinances of the City of Rye (Section 4-3.5), and they are not any less effective or indicative of an ulterior motive because they are there rather than in the Sanitary Code.

d. The ordinance causes no undue hardship to any property owner as it provides for the issuance of a permit in the event of practical difficulty or unnecessary hardship in drying clothes elsewhere. The fact that the ordinance provides for such exceptions does not affect its validity. A procedure allowing for exceptions in the event of a practical difficulty or unnecessary hardship is a very common procedure in the regulation of land uses. It permits of a fair, reasonable and realistic enforcement of the ordinance without undue hardship to any property owner. To have done otherwise would have been blind adherence to form. Neither do such exceptions demonstrate that the ordinance was not founded on aesthetic considerations. A procedure allowing for exceptions where undue hardship might develop allows for better control and a greater attainment of the aesthetic and other objectives of the ordinance.

e. The fact that the ordinance is precisely and narrowly drawn, as noted by the Court of Appeals, is significant in weighing whether there is any real interference with freedom of speech. The practical operation of the ordinance demonstrates that it was founded upon aesthetic considerations and was not intended to interefere with appellants' rights of freedom of speech and press. It was designed to proscribe conduct which offends the sensibilities of the average person and tends to depress property values. It was also intended to improve visibility in the use of driveways and at intersections. The ordinance may have some incidental restraint because of the frivolous claim that the maintenance of a number of clothes lines in the front yard, filled with rags, is a form of speech which should be given a preferred position over the rights of others in the enjoyment of their property and the amenities of the community. Unquestionably the interests of the inhabitants of the community under the circumstances here are paramount.

Conclusion

The "permanent" maintenance of a half dozen or more clothes lines in the front yard of a residence and at a corner of an intersection, filled with rags, does cause injury to real estate values and offend the sensibilities of most inhabitants. There is no restraint of freedom of speech and press in violation of the First and Fourteenth Amendments.

Appellee respectfully submits, therefore, that the appellants present no substantial federal question for the decision of this Court and the Court should refuse to note jurisdiction in this cause and dismiss the appeal.

Respectfully submitted,

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